



DECISION



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**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20546**

FILE: B-202418.2

MATTER OF: Humanics, Ltd.

DATE: June 2, 1982

DIGEST:

1. Protest allegations of improper use of funds received under Government contract are dismissed. Expenditures and billing under a Government contract relate generally to contract administration which is the function and responsibility of the procuring agency. Moreover, subject contract will be audited by procuring agency, and vouchers will be disallowed if payment is not authorized under the contract.
2. Protest alleging that incumbent contractor hired protester's employees is dismissed as it provides no basis to challenge the validity of contract award.
3. Protest alleging that contracting officer was promised political help to advance her career in an effort to obtain contract award is denied. Protester's allegation is undocumented and is emphatically denied by contracting agency. Since entire record contains only conflicting statements of agency and protester, protester has not carried the burden of proving its case.
4. Allegation that option was exercised improperly because option provision of contract limited duration of basic plus option periods to 12 months is denied. Review of entire solicitation and option clause shows that intent of parties was to contract for a basic period of 1 year with options for 2 additional years and that insertion of number "12" instead of "36" was obviously an error in expression. Therefore, exercise of option was proper.

5. Protest that option was improperly exercised is denied. Contracting agency legitimately considered potential disruption in contract services, satisfactory performance of incumbent contractor, and administrative budget restraints, which might cause lack of personnel to process resolicitation, in deciding that exercise of option was in best interests of Government. Furthermore, option increase of 8 percent was considered reasonable in view of current rate of inflation and option prices were considered as part of original solicitation negotiations and evaluations. Accordingly, we cannot find contracting agency's decision to exercise option to be unreasonable.

Humanics, Ltd., protests under contract No. 140-79-0055 between the Department of Health and Human Services (HHS) and Humanics Associates. The protester has raised a number of issues which it contends invalidate the award of the original contract and the exercise of options for 2 additional years. We have reviewed the record and conclude that either the issues raised are not appropriate for consideration under our bid protest function or the allegations are without merit. Accordingly, the protest is dismissed in part and denied in part.

The contract, which is for providing training and technical assistance to the Head Start programs in five States, was awarded to Humanics Associates on a cost-reimbursement basis on September 28, 1979. The basic contract was for 1 year but provisions for two 1-year options were included in the contract. Humanics, Ltd., charges that the award of the original contract and exercise of the options were improper and has made the following allegations:

1. The president of Humanics Associates directed employees of the firm to submit false reports of expenses to establish the appearance of increased indirect cost rates in order to receive increased reimbursement under this contract;

2. Humanics Associates diverted funds received under the contract to set up a publishing business which was not authorized under the contract;
3. Contract funds were used improperly to buy employees various club memberships and tickets to sporting events;
4. Humanics Associates employees were paid unauthorized incentive bonuses out of contract funds for obtaining contracts with the State of Georgia;
5. Time billed to the Government and funds received under the contract were spent to advertise and sponsor unauthorized profitmaking seminars;
6. Though not authorized under the contract, funds were used to pay attorneys' fees for litigation;
7. Humanics Associates used funds from this contract to support its below-cost bids in State procurements;
8. The officers of Humanics Associates used contract funds to make unauthorized political contributions;
9. Humanics Associates hired employees from Humanics, Ltd., directly, without public advertisement of the positions;
10. Humanics Associates promised to use its political influence to advance the career of the contracting officer in an effort to obtain the original award and to have the options exercised; and
11. The options were improperly exercised in contravention of the terms of the contract and HHS's regulations governing their use.

The first eight allegations made by the protester relate to the use of funds received by Humanics Associates after HHS had awarded the contract. The contracting agency reports that all vouchers submitted for payment by Humanics Associates are subjected to a preliminary review before payment is made. Furthermore, the agency has found no support in any of the protester's charges in these rather detailed vouchers. Finally, due to the cost-reimbursement nature of the contract, a closeout audit will be performed by the audit division of HHS and vouchers will be disallowed if payment is not authorized under the contract.

Since the first eight bases for protest concern expenditures and billing under the contract, these issues relate generally to matters of contract administration rather than the propriety of the award. Contract administration is the function and responsibility of the procuring agency and such matters are not for resolution under our Bid Protest Procedures, 4 C.F.R. part 21 (1981). Schmidt Engineering & Equipment Co., Ltd., B-198542, February 19, 1981, 81-1 CPD 108.

The ninth allegation regarding the hiring of Humanics, Ltd.'s, employees provides no basis to challenge the validity of Humanics Associates' contract. This charge appears to involve a dispute between private parties and alleges no wrongdoing by Government officials. See Kisco Company, Inc., B-200831.2, February 26, 1981, 81-1 CPD 149. Therefore, it is dismissed.

The tenth allegation is a serious charge which, if true, would threaten the integrity of the entire procurement process. However, HHS has emphatically denied that there is any truth to this allegation, and there is no evidence in the record to support the protester's statement. Since the entire record contains only the conflicting statements of the agency and the protester, we conclude that the protester has not carried the burden of affirmatively proving its case. Fire & Technical Equipment Corp., B-191766, June 6, 1978, 78-1 CPD 415. Accordingly, the protest is denied on this issue.

The final protest allegation concerns the exercise of two options under the basic contract. The first

option was exercised on June 30, 1980, and extended the term of the contract to September 23, 1981. Humanics, Ltd., filed a protest against the exercise of this option on March 9, 1981. We closed our file without taking any action on the merits of the protest on April 7, 1981, because the protester did not submit a detailed statement of the grounds for protest as we requested by phone call on March 17 and by letter of March 18. Accordingly, we will not now consider the protest against exercise of the first option. See Manalytics, Inc., B-193359, December 26, 1978, 78-2 CPD 435. However, on June 19, 1981, Humanics, Ltd., filed a protest charging that HHS was about to exercise the second option in an improper manner. In fact, the second option, which extended the term of the contract to September 24, 1982, was exercised on July 17, 1981. Since Humanics, Ltd., filed its protest against exercise of the second option in a timely manner (before the second option was exercised) and because the protester submitted sufficient details on this protest, we will consider the allegations of improprieties connected with the exercise of the second option.

Humanics, Ltd., charges that exercise of the option was improper because: (1) it extended the term of the contract to a total of 36 months when the option provision contained in the contract limits the entire contract period (basic period plus all option periods) to just 12 months and (2) it violated HHS procurement regulations governing use and exercise of options.

The option provision in question is contained in article XXIII of the contract and states:

"ARTICLE XXIII OPTION TO EXTEND THE TERM OF
THE CONTRACT"

- "1. At the option of the Government, this contract may be extended, by the Contracting Officer giving written notice of extension to the Contractor prior to the expiration date of this contract. * * *
If the Government exercises such option, the contract as extended shall be deemed to include this option provision; Provided,

however, That the duration of this contract, including the exercise of any options under this clause shall not exceed 12 months. * * *

- "2. In the event that the contract is extended in accordance with paragraph 1 of this Article, the Contractor shall continue the effort, described in ARTICLE I-----SCOPE OF WORK, during the Option period immediately following that set forth in ARTICLE-----PERIOD OF PERFORMANCE. The parties hereto agree that upon issuance of the order exercising this option, the following modifications will be made to the contract schedule in effect as of the date that such issuance is made:

"(1) The period of performance specified in ARTICLE-----PERIOD OF PERFORMANCE will be increased by--twelve (12) months per option period.

* * * * *

(Emphasis added.)

The protester contends that, under article XXIII, paragraph 1, of the contract, the duration of the basic plus option years cannot exceed 12 months. Therefore, the agency's attempt to extend the contract beyond the basic year by exercising the second option violated the contract's own 12-month limitation.

HHS has not explained why the number "12" was inserted in the blank in article XXIII, paragraph 1. However, the agency argues that the paragraph must be read as a whole in order to understand that the contract clearly contemplated a possibility of 36 months of actual performance if both options were exercised. The agency argues that the protester's reading of the option provision renders the option provision meaningless.

The record shows that the original solicitation contained the number "36" but that the contract actually awarded to Humanics Associates contains the number "12" in article XXIII, paragraph 1. In our opinion, it is obvious from a reading of the entire solicitation that a contract period of 1 year and potentially 2 years of options was intended. For example, in addition to the provision referred to above, the cover letter to the invitation for bids stated that an estimated level of effort of 880 person-days would be required for the "initial award," as well as for "OPTION I - YEAR II" and "OPTION II - YEAR III." The invitation also required submission of a contract pricing proposal for fiscal years 1980, 1981, and 1982. Apparently, the insertion of the number "12" in article XXIII, paragraph 1, of the contract awarded was an error. This is also evident when paragraph 2(i) of the option provision is read since it states that each option period will increase the period of performance by 12 months. Clearly, since two option periods of 1 year each were contemplated and the initial contract period was to be 12 months, the correct number, "36," should have been inserted in paragraph 1 of the option provision. In these circumstances, the error was so obvious and the true intent of the parties so clear, that the agency and contractor could properly have corrected the error in expression. See 3 Corbin on Contracts § 552 (1960) and cases cited therein. Accordingly, the exercise of the second option did not exceed the true intent of the contract, and the protest is denied on this issue.

The protester has not provided any detail as to how HHS allegedly violated its own regulations other than to cite the regulation in 41 C.F.R. subpart 3-1.54 (1981) entitled "Options." However, we have reviewed the agency's justifications for exercising the second option in light of the cited regulation and conclude that the second option was properly exercised.

The circumstances under which an option may be exercised are set forth in 41 C.F.R. § 3-1.5404(c), which requires, among other things, a determination that exercise of the option is the most advantageous method of fulfilling the Government's needs, price and other factors considered. Our Office will not object to such a determination unless applicable

regulations were not followed or the determination itself is unreasonable. Cerberonics, Inc., B-199924, B-199925, May 6, 1981, 81-1 CPD 351.

The record shows that HHS's determination that exercise of this option would be in the best interests of the Government was based, in part, upon budgetary restraints within the agency's procurement planning branch. The procurement planning branch had experienced a 500-percent increase in workload with no additional personnel to perform the work. The procurement planning branch felt it would not be able to process a resolicitation for this type of contract due to its lack of manpower. Furthermore, service by incumbent contractors had been "greatly improved" and a determination had been made that "it is unlikely that a better price will result from competition this coming year." In addition, decreases in contracting activity budgets were cited as justification for retaining the expertise of incumbent contractors. Concerning the extension of Humanics Associates' contract, in particular, the agency had determined that: (1) the incumbent had performed satisfactorily and (2) the increase in cost (8 percent additional for fiscal year 1982) was reasonable given the general rate of inflation.

In reviewing the agency's decision to exercise the option, we conclude that continuity of the technical assistance services was paramount. We have held that potential disruption of necessary services is a legitimate factor to be taken into account when determining whether the exercise of an option is the most advantageous method of fulfilling an agency's need. We have also recognized the legitimacy of considering an incumbent's satisfactory performance. See Cerberonics, Inc., supra, and cases cited therein. Furthermore, the options in this contract were set forth in the initial solicitation and were considered by the agency during negotiations, even though technical excellence was the primary evaluation factor. During negotiations, Humanics Associates agreed to reduce its option prices, the agency disallowed certain cost items from the options (with Humanics Associates' consent), and the prices negotiated for both initial and option years were determined reasonable. We have held that where, as here, the option did not arise by subsequent modification of the contract, but was evaluated under the original solicitation, our concern with competitive pricing is largely satisfied. Cerberonics, Inc., supra.

In these circumstances, we conclude that the contracting agency's determination that exercise of the option was in the best interests of the Government was based upon legitimate factors and, therefore, was reasonable. Accordingly, this issue of protest is denied.

The protest is denied in part and dismissed in part.

for Milton J. Arslan
Comptroller General
of the United States

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